STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 29, 2011
v	No. 298199 Washtenaw Circuit Court
DOMINIC DEANGELO OYERINDE, Defendant-Appellant.	LC No. 09-000089-FC

Before: WHITBECK, P.J., and MURRAY and DONOFRIO, JJ.

PER CURIAM.

Defendant, Dominic Oyerinde, appeals by right his conviction entered following a bench trial of first-degree felony murder,[1] and carjacking.[2] The trial court sentenced Oyerinde to 225 months to 40 years in prison for the carjacking conviction and life in prison for the felony murder conviction. We affirm.

I. BASIC FACTS

A. THE VICTIM'S ASSAULT AND SUBSEQUENT DEATH; THE SEARCH FOR THE SUSPECT

A motorist driving through the area of North Congress Street and Oakwood saw the victim, Anna Maria List, lying on the ground with blood on her face at approximately 1:20 a.m. on January 13, 2009. The motorist contacted emergency services, and paramedics found List's body covered with a light coating of snow. List was alive but unresponsive at the time. Paramedics transported List to the hospital by ambulance.

The emergency room physician noted that List's head wounds were likely the result of being hit with a blunt object. List survived for a week on a ventilator, but she eventually died from a severe traumatic brain injury. List's autopsy revealed fractures in the center of her forehead and on the back of her skull. List's brain was extensively damaged beneath the

[1] MCL 750.316(1)(b).

[2] MCL 750.529a.

fractures. The forensic pathologist testified that either blow, individually, would have caused loss of consciousness and ultimately death. The pathologist also testified that the wounds were consistent with being hit with the head of a hammer and that it would take a "full swing of the hammer" to cause the injuries.

The motorist who found the body testified that he saw two sets of footprints leading up to List's body. Ypsilanti Police Department Officer Brooke Harrison responded to the scene and testified that she found and photographed two parallel sets of footprints, headed eastbound and leading to List's body. Officer Harrison testified that one set of footprints appeared as though someone was dragging their feet. One set of footprints lead away from List's body going southbound through an area called Recreation Park. Along the path of the single set of footprints leading away from the body, Officer Harrison found a pair of shoes. Officer Harrison also found a bottle of a nail polish, lip gloss, and a scarf in the vicinity of List's body after she was taken to the hospital.

A canine handler from the City of Ann Arbor Police Department testified that he arrived at the scene to conduct a search for a potential homicide suspect. The officer testified that he began his search from the area where the shoes were found. He did not use the dog because he could see tracks to follow. The officer testified that the footprints were a single set and were consistent with someone running. The officer followed the tracks through the park in a southwesterly direction, into a schoolyard, until the tracks turned north and went over a fence into the backyard of 1127 North Congress Street. The officer scaled the fence and continued to follow the tracks. The officer noted that at this point the footprints had toes, indicating bare feet. The officer searched the garage in the backyard of 1127 North Congress but did not find anyone. He lost the tracks in a confusion of footprints after following them into the side yard, but noted that the gate on the side of the house leading to the street had recently been opened, displacing snow.

Before leaving to return to the hospital, the supervising paramedic that responded to the scene noted fresh tire tracks that indicated a vehicle driving erratically and "bouncing off the curb." He also noticed footprints between the tracks. He contacted his dispatch to have one of the police officers come over to look at the tracks. While the supervising paramedic was preparing his report, a white male walking from the direction of North Wallace Street approached him and said something like, "I know what's going on down the road and I think you guys are gonna wanna talk to me." The paramedic relayed this information to the police. The responding police officer spoke with the person, who identified himself as Zachary Wujick. The officer detained Wujick because he believed that he might be involved in the assault and then turned him over to the officer in charge.

B. DEFENDANT'S ACTIVITIES BEFORE AND AFTER THE ASSAULT

Michelle King owned the house at 1127 North Congress and testified that Oyerinde frequently visited her house to "hang out" with her daughter, Ele Ora Skinner, and her boyfriend, Zachary Wujick. She testified that on January 11, 2009, she observed Oyerinde in the car with List. Oyerinde got out of List's car and into King's car so King could drive Oyerinde to the store. King stated that Oyerinde "seemed a little agitated and frustrated" and said that he was "sick of that bitch."

James Wilton testified that he spent the day of January 12, 2009, with Oyerinde in Ann Arbor, walking around and smoking marijuana. He testified that at some point Oyerinde became upset because his cell phone was missing. He testified that Oyerinde became aggressive and threatening, to the point where Wilton "pulled out a pocket knife on [Oyerinde] to try to get him to stand back."

Wujick testified that he and Oyerinde made plans to meet at the North Congress house on the evening of January 12, 2009. Wujick testified that Oyerinde arrived at the house at about 10:30 p.m. He stated that Oyerinde appeared angry, and Oyerinde said his stolen phone was in Ann Arbor and he wanted to get it back. Oyerinde used Wujick's phone to call List.

Wujick testified that after List arrived, Oyerinde left the house with her for a short time. Oyerinde returned "red in the face and teary-eyed." Oyerinde asked to use Wujick's phone again; Wujick thought that he was arguing with List on the phone. Oyerinde then left the house a second time. At some point Wujick looked out the window and saw that the van List drove had returned. Wujick stated that his "anxiety level started going up" because he thought something might be wrong, so went out to the front stairs to smoke a cigarette. Wujick testified that there were two people in the van, and he believed List was in the driver's seat, although he was not sure. He testified that he thought there was some kind of argument in the van, that he thought he heard List yelling, and that he heard Oyerinde use the words "bitch, bitch, bitch, bitch, bitch."

Some time later, Wujick heard the van doors open and shut. About five minutes later, he thought he heard the sound of breaking glass, followed a few minutes later by the sound of the gate to the house opening and closing. When he looked out the window, he stated that he saw Oyerinde "making a two-point turn" out of the driveway in List's van. On cross-examination, Wujick stated that he was not sure that it was Oyerinde driving, as it was dark. He noted that the van "hit the curb or something" as it turned onto Wallace Street. Wujick stated that the blue Converse shoes recovered from the scene were of the type Oyerinde generally wore, but stated that Oyerinde normally drew all over his shoes, and that his shoes normally had specific wear marks from skateboarding, which the shoes recovered from the scene lacked.

Skinner testified that she lived at 1127 North Congress at the time of the incident and that Wujick and Oyerinde frequently stayed over. She testified that Oyerinde arrived on the night in question at around 11:30 p.m. or 12 midnight. She stated that Oyerinde said something about someone taking his phone and that he seemed agitated about it. She gave essentially the same testimony as Wujick concerning Oyerinde's calls to List. Skinner testified that Oyerinde said "something about how he thinks that he would be going to prison that night."

Oyerinde's cousin, Lamone Waddy, testified that he lived in Detroit, and on January 13, 2009, he received a phone call from his brother telling him that Oyerinde was in town. He testified that when he arrived home from school, Oyerinde was at his house with a van. He testified that Oyerinde said he bought the van. Waddy testified that Oyerinde told him "he had got into a argument [sic] with his girl and then he got into it with some guys 'cause [they] took his phone and he put one of 'em in the hospital." Waddy asked Oyerinde to take him to the store, and en route police stopped and arrested them.

A Detroit Police Department plainclothes officer testified that he had received information that a silver mini-van was stolen from a critical assault the previous night. The officer spotted a van with the license plate that matched the report and pulled it over. Oyerinde was driving the van.

City of Ypsilanti Police Department detectives interviewed Oyerinde. A detective testified that he asked Oyerinde if he knew why he was arrested, to which Oyerinde replied, "because I had my friend Anna's car. I stole it from her last night."

C. RECOVERY OF EVIDENCE FROM CRIME SCENE

Ypsilanti police detectives searched the area where the motorist initially found List's body. Nothing was recovered on January 13, 2009, due to the snow. However, on February 9, 2009, detectives recovered a claw hammer near the fence at the rear of 1127 North Congress. List's father testified that he had purchased a hammer from Ace Hardware on September 26, 2008, and that it was stored in the back of the van that List drove. He stated that when he got the van back from the police, there was no hammer in the back. He stated that the recovered hammer appeared to be the same hammer. List's blood was on the hammer, and her phone was later recovered from a young girl who had apparently found and used the phone.

D. OTHER ACTS TESTIMONY

List's father, brother, and sister testified concerning an incident that took place on December 11, 2008, where Oyerinde allegedly broke the windshield of List's van with a brick. The three family members essentially testified to the same set of facts: that on December 11, 2008, List had called them to say that her boyfriend had thrown a brick and broken the windshield of the car after she told him she wanted to break up. Officer Harrison was also the officer dispatched to respond to the brick incident and confirmed that a thrown object had smashed the driver's-side windshield. The trial court admitted this testimony under the excited utterance exception to the hearsay rule, finding that List was still under the influence of the startling event when she made the phone calls.

The prosecution also sought to elicit testimony from List's sister concerning an incident where Oyerinde allegedly threw List's car keys in the snow. The trial court sustained defense counsel's objections to statements that List allegedly made because they were hearsay not within any exception.

The prosecution also sought to introduce Facebook messages involving Oyerinde into evidence. The trial court broke these messages into three categories: (1) messages that Oyerinde sent, (2) messages that List sent to Oyerinde, and (3) messages that List sent to her sister about Oyerinde. The trial court admitted the messages that Oyerinde sent as admissions, and admitted the other two groups of messages under two theories: that they were admissible to show List's state of mind at the time of the messages, and alternatively under MCL 768.27b, which governs the admissibility of evidence of a defendant's commission of other acts of domestic violence.

Finally, the prosecution played a series of conversations involving Oyerinde that were recorded while he was in jail. Defense counsel did not object to the admission of this recording.

E. TRIAL COURT'S FINDINGS AND CONVICTION

The trial court found that List was attacked on January 13, 2009, in Washtenaw County. The trial court found that Oyerinde was with Wilton and two others in Ann Arbor from a time period starting at 8:00 to 8:30 p.m. and lasting several hours. The trial court found that Oyerinde arrived at the house on North Congress Street around 11:30 p.m. to midnight. The trial court found that Oyerinde called List on Wujick's phone and that she arrived shortly after. The trial court found that Oyerinde left the house and returned a short time later, made another call to List, and left again. The trial court found that there was "some sort of an argument" between Oyerinde and List during the second phone call and that there was an altercation in the van that involved the Oyerinde repeatedly using the word "bitch."

The trial court found that the motorist who found the body called 911 at 1:20 a.m., and that officers and ambulances arrived shortly afterward. The trial court found that the cause of the death was homicide based on the testimony from medical experts. The trial court concluded that based on the amount of snow covering List's body, the assault had occurred seconds or minutes before her body was found. The trial court held, based on the DNA evidence, the location of the hammer, and the forensic pathologist's testimony about List's wounds, that the hammer was the murder weapon.

The trial court found that Oyerinde lied to his cousin about purchasing the van and inferred that he took the van without List's permission and used it for his own purpose.

The trial court found that no evidence supported the idea that anyone else was present at the scene of the assault, or that Oyerinde found List's body and panicked.

The trial court stated that Oyerinde intended to kill List, either directly, or by knowingly creating a very high risk of death or great bodily harm. The trial court gave weight to the testimony that a full swing of the hammer would have been required to cause List's injuries. The trial court did not find premeditation. The trial court stated that Oyerinde's intent could be inferred collectively from his actions before the assault and his statements after the assault. The trial court found no justification for the homicide.

The trial court found that all the elements of carjacking were satisfied. Oyerinde used force or violence on List while in the course of committing a larceny of a motor vehicle, because he took the vehicle and moved it with the intent to take the vehicle and use it for his own purposes, such that it demonstrated his intent to take it away permanently. Finally, List was the person in lawful possession and operator of the vehicle.

The trial court convicted Oyerinde of first-degree felony murder and carjacking, and Oyerinde now appeals.

II. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

Oyerinde argues that the evidence admitted at his bench trial was insufficient to support his convictions for felony murder, carjacking, and second-degree murder. This Court reviews a

challenge to the sufficiency of the evidence de novo, taking the evidence in the light most favorable to prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.[3] Circumstantial evidence and reasonable inferences drawn from that evidence may be sufficient to prove the elements of a crime.[4]

B. CARJACKING

Oyerinde argues that there is insufficient evidence to show that any force or violence directed against List had any connection to Oyerinde's taking possession of the motor vehicle. Thus, Oyerinde argues, the elements of carjacking cannot be established.

MCL 750.529a provides in part as follows:

> (1) A person who in the course of committing a larceny of a motor vehicle uses force or violence or the threat of force or violence, or who puts in fear any operator, passenger, or person in lawful possession of the motor vehicle, or any person lawfully attempting to recover the motor vehicle, is guilty of carjacking, a felony punishable by imprisonment for life or for any term of years.
>
> (2) As used in this section, "in the course of committing a larceny of a motor vehicle" includes acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the motor vehicle.

In order to prove carjacking, the prosecution must prove that a defendant (1) took a motor vehicle from another person (2) in the presence of that person, a passenger, or any other person in lawful possession of the motor vehicle, and (3) that the defendant did so either by force or violence, by threat of force or violence, or by putting another in fear.[5] Carjacking is a general intent crime.[6] The carjacking statute does not require the intent to deprive the victim of a motor vehicle permanently, or a specific intent to use force, violence, threaten, or induce fear.[7]

Oyerinde does not dispute that he took the victim's van, but argues that the second and third elements of carjacking are not satisfied.

---

[3] *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010).

[4] *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

[5] *People v Green*, 228 Mich App 684, 694; 580 NW2d 444 (1998).

[6] *People v Davenport*, 230 Mich App 577, 578; 583 NW2d 919 (1998).

[7] *Id.* at 580-581.

"A [vehicle] is in the presence of a person . . . which is within his reach, inspection, observation or control, that he could, if not overcome by violence or prevented by fear, retain his possession of it."[8] Here, the evidence is sufficient to infer that List had possession of the keys to the van. She arrived in the van, and Wujick testified that he believed she was in the driver's seat when he viewed an argument going on in the van. No testimony supports Oyerinde's contention that List left the keys in the van or that Oyerinde had keys for the van the whole time. Moreover, List's belongings were strewn around her body, suggesting that her pockets had been emptied. In any event, had List left the keys in the van, she could still be said to be in control of the van because she could have retained her possession but for Oyerinde's assault.[9] Accordingly, the "presence" element of carjacking was satisfied.

As we will discuss below, the evidence is sufficient to infer that Oyerinde used the hammer on List. Oyerinde argues that the force or violence that must be shown somehow must be connected to taking possession of the motor vehicle. Again, a specific criminal intent beyond the intent to do the act of carjacking itself is not required.[10] A defendant does not have to intend at the time he applies force, threats, or fear to the victim that the act result in his taking possession of the car; it is sufficient if the violence, threat, or fear in fact facilitated the defendant's taking of the car.[11] Further, the evidence established Oyerinde's desire for transportation before the commission of the carjacking. A reasonable trier of fact could infer that Oyerinde attacked the victim with a hammer, at least in part, to obtain her vehicle.

Thus, we conclude that the evidence the trial court admitted at Oyerinde's bench trial was sufficient to support his convictions for carjacking.

C. FELONY MURDER

The elements of first-degree felony murder are that the defendant (1) killed a human being, (2) with malice, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies enumerated in MCL 750.316(1)(b).[12] MCL 750.316(1)(b) provides as follows:

> Murder committed in the perpetration of, or attempt to perpetrate, arson, criminal sexual conduct in the first, second, or third degree, child abuse in the first degree, a major controlled substance offense, robbery, carjacking, breaking and entering of a dwelling, home invasion in the first or second degree, larceny of any kind, extortion, kidnapping, vulnerable adult abuse in the first and second degree

---

[8] *People v Raper*, 222 Mich App 475, 482; 563 NW2d 709 (1997) (internal quotation marks and citation omitted).

[9] *Id.*

[10] *Davenport*, 230 Mich App at 580-581.

[11] *Id.*

[12] *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999).

under section 145n, torture under section 85, or aggravated stalking under section 411i.

Malice is an essential element of any murder, including felony murder.[13] To establish malice, the evidence must show that the defendant either acted with (1) the intent to kill, (2) the intent to do great bodily harm, or (3) the wanton and willful disregard of the likelihood that the natural tendency of his behavior is to cause death or great bodily harm.[14]

It is undisputed that Anna Marie List died as a result of blows from a hammer to her head. Numerous expert witnesses testified regarding the extent of her injuries, her otherwise good health, and the progression of her injury into death. A rational trier of fact could have determined that the hammer found near the fence behind 1127 North Congress was the murder weapon given that List's blood and DNA were found on it and that the forensic pathologist stated her head injuries were consistent with blows from a hammer. The forensic pathologist also testified that it would take a "full swing of the hammer" to cause the injuries, either one of which would have caused her eventual death. A rational trier of fact could reasonably conclude that whoever swung the hammer with such force did so with malice. Thus, a rational trier of fact could readily conclude that the person who hit List with the hammer killed her with malice.

Further, sufficient evidence exists to establish that Oyerinde was List's assailant. The evidence showed that Oyerinde called List to come pick him up and that she arrived driving a silver van. The evidence showed that some sort of argument ensued between Oyerinde and List that resulted in her leaving, only to return after a second phone call from Oyerinde. Wujick later saw two people having some sort of argument in the van. Wujick heard the van door slam, and approximately eight minutes later he heard the wooden gate attached to the house open. Wujick saw someone get in the van and drive away shortly after the gate opened. Two sets of footprints led to the spot on the ground where List was found, while only one set lead away from the area. A police officer testified that the footprints led to a fence behind 1127 North Congress and that it appeared the person making the tracks had scaled the fence. A hammer and the victim's phone were later recovered near the fence. The officer following the tracks noted that the gate at 1127 North Congress had been recently opened. Oyerinde was arrested the next day in List's van.

The final element of felony murder is that the killer formed the intent to commit the underlying felony before the homicide. Oyerinde correctly asserts that the felony-murder doctrine will not apply if the killer did not form the intent to steal the victim's property until after the homicide.[15] However, it is not necessary that the murder occur contemporaneously with the enumerated felony, only that the killer must have intended the underlying felony at the time he murdered the victim.[16] Intent can be inferred from all the facts and circumstances of the case.[17]

---

[13] *People v Flowers*, 191 Mich App 169, 176; 477 NW2d 473 (1991).

[14] *Id.*

[15] *People v Brannon*, 194 Mich App 121, 125; 486 NW2d 83 (1992).

[16] *People v Kelly*, 231 Mich App 627, 643; 588 NW2d 480 (1998).

Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient.[18]

In *People v Kelly*, the defendant murdered his girlfriend and took several pieces of her property, including her car, from the scene.[19] The defendant was found attempting to sell the stolen property shortly after the murder.[20] This Court noted that the defendant did not have his own transportation and needed the victim's car to escape the scene.[21] This Court held that a reasonable jury could conclude that the defendant formed the intent to steal the victim's property before or at the time of the killing.[22]

Oyerinde makes the same bare assertion that the defendant in *Kelly* made,[23] that is, that the prosecution presented no evidence to show that Oyerinde formed the intent to steal List's property before or during the homicide rather than after. However, Oyerinde's conduct bears a striking similarity to that of the defendant in *Kelly*. Here, Oyerinde lacked transportation and needed List's van to escape the crime scene. The evidence also established that Oyerinde desired transportation in order to go to Ann Arbor to retrieve his cell phone. Additionally, Oyerinde was found shortly after the murder acting in a way that indicated his intent to permanently deprive List of her automobile.

Thus, we conclude that the evidence admitted at his bench trial was sufficient to support Oyerinde's convictions for felony murder.

D. SECOND-DEGREE MURDER

With respect to Oyerinde's challenge to the sufficiency of the evidence on his conviction of second-degree murder,[24] the judgment of sentence clearly provides that this conviction was vacated. Thus, any argument regarding evidence that the prosecution introduced in support would be purely academic and we decline to address it.

---

[17] *People v Cameron*, ___ Mich App ___; ___ NW2d ___ (Docket No. 293119, issued February 15, 2011); *People v Daniels*, 163 Mich App 703, 706; 415 NW2d 282 (1987).

[18] *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008).

[19] *Kelly*, 231 Mich App at 643.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id*.

[24] MCL 750.317.

III. OTHER ACTS EVIDENCE

A. STANDARD OF REVIEW

Oyerinde argues that the trial court erred in admitting other acts evidence. Specifically, he challenges admission of evidence regarding an incident where he allegedly threw a brick through List's windshield, as well as evidence of electronic messages that Oyerinde and List sent on Facebook. The admissibility of other acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion.[25] A court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes.[26]

B. UNDERLYING FACTS

The trial court admitted testimony from members of List's family concerning statements she made to them about Oyerinde throwing a brick through her car window. The trial court determined that, although the statements were hearsay, they were admissible under the "excited utterance" exception to the hearsay rule.[27] To be admissible under this exception to the hearsay rule, the party offering the evidence must prove (1) that there was a startling event and (2) that the resulting statement was made while the witness was still under the influence of the startling event.[28] The time that passes between the event and the statement is important, but not dispositive; the trial court's analysis should focus on "the lack of capacity to fabricate, not the lack of time to fabricate."[29]

List's brother testified that when she made the statements to him concerning the brick incident, she was "[u]pset, extremely upset, distraught. She was crying. She was speaking in a matter [sic] that I'd never really heard before." Her father similarly testified that she appeared "upset," "bereft," and "frightened" when she told him about the incident. The trial court's conclusion that List was still under the influence of the startling event when she made the statements was not erroneous.

The trial court stated that the other acts evidence, collectively, was used to provide a context for the relationship between Oyerinde and List. MCL 768.27b(1) provides:

> Except as provided in subsection (4), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's

---

[25] *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998); *People v Waclawski*, 286 Mich App 634, 670; 780 NW2d 321 (2009).

[26] *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007).

[27] MRE 803(2).

[28] *People v Smith*, 456 Mich 543, 551; 581 NW2d 654 (1998).

[29] *Id.*

> commission of other acts of domestic violence is admissible for any purpose for which it is relevant, if it is not otherwise excluded under Michigan Rule of Evidence 403.

MCL 768.27b(5) provides as follows:

> (a) "Domestic violence" or "offense involving domestic violence" means an occurrence of 1 or more of the following acts by a person that is not an act of self defense:
>
> (*i*) Causing or attempting to cause physical or mental harm to a family or household member.
>
> (*ii*) Placing a family or household member in fear of physical or mental harm.
>
> (*iii*) Causing or attempting to cause a family member to engage in involuntary sexual activity by force, threat of force, or duress.
>
> (*iv*) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested.
>
> (b) "Family or household member" means any of the following:
>
> (*i*) A spouse or former spouse.
>
> (*ii*) An individual with whom the person resides or has resided.
>
> (*iii*) An individual with whom the person has or has had a child in common.
>
> (*iv*) An individual with whom the person has or has had a dating relationship. As used in this subparagraph, "dating relationship" means frequent, intimate associations primarily characterized by the expectation of affectional involvement. This term does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context.

Here, witness testimony clearly established that Oyerinde and List were in a dating relationship. It is a logical inference that Oyerinde's act of throwing a brick at the windshield placed List in fear of physical harm and caused her to feel terrorized, frightened, intimidated, threatened, harassed, or molested. The testimony of her family confirms this. The event occurred mere months before List's murder and was also an act of domestic violence. Thus, MCL 768.27b(1) allows the admission of this evidence, provided that MRE 403 does not exclude it.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or

by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[30] Unfair prejudice exists when there is a tendency that the finder of fact will give the evidence undue or preemptive weight.[31]

Evidence of the brick incident was relevant to show that Oyerinde had reacted with physical violence during altercations with List in the past. This evidence was more probative than prejudicial, especially in light of the trial court's stated reliance on other testimony and physical evidence in determining Oyerinde's guilt. The testimony was not extensive or inflammatory, nor did it interfere with the fact-finder's ability to logically weigh the evidence,[32] particularly where the fact-finder was a trial judge well-versed in the rules of evidence. The trial court did not abuse its discretion in admitting this testimony.

The trial court properly determined that the first category of Facebook messages (that Oyerinde sent to List) was admissible non-hearsay. MRE 801(d)(2) states that "[a] statement is not hearsay if . . . [t]he statement is offered against a party and is (A) the party's own statement, in either an individual or representative capacity." The messages that Oyerinde sent to List were his own statements.

The trial court held that the second and third categories of messages (that List sent to Oyerinde; that List sent to her sister about Oyerinde) were admissible under the state of mind exception to the hearsay rule. MRE 803(3) states that, regardless of availability of the witness, the hearsay rule does not exclude

> [a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Statements by murder victims regarding their plans and feelings have been admitted under the state of mind exception to show marital discord, motive, and the victim's fear of the killer.[33] However, this Court has cautioned that *Fisher* and *Ortiz* do not stand for the proposition that statements of memory and belief and statements that described a defendant's actions are admissible under this rule because they come from a murder victim.[34]

---

[30] MRE 403.

[31] *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008).

[32] See *People v Railer*, 288 Mich App 213, 220-221; 792 NW2d 776 (2010).

[33] See, e.g., *People v Fisher*, 449 Mich 441, 450; 537 NW2d 577 (1995), and *People v Ortiz*, 249 Mich App 297, 307-308; 642 NW2d 417 (2001).

[34] *People v Moorer*, 262 Mich App 64, 73; 683 NW2d 736 (2004).

Oyerinde states that the Facebook messages admitted concerned incidents where Oyerinde allegedly deleted all of the male contacts on List's phone, poured out her coffee, and threw her keys in the snow during an argument. The messages were not read into the record, and the trial court and trial counsel did not specifically refer to the alleged deleting of the contacts or pouring out of coffee. There was testimony from List's sister about having to give List a ride, apparently after the keys incident. However, the trial court stated that it reviewed the Facebook messages to provide context for Oyerinde and List's relationship:

> [The messages] certainly describe at times a troubled relationship between [Oyerinde and List], again putting in context the allegations of the incident regarding the brick with the windshield, the incident of January 12th leading into January 13th. Collectively again they provide the Court with context as to [Oyerinde's] state of mind on January 13th, given all the other testimony of the witnesses and specifically what [Oyerinde] has said what he did.

Regardless whether some of the messages should not have been admitted under MRE 803(3), the trial court did not rely on the messages to prove that any events actually occurred. The trial court specifically noted that it relied on Oyerinde's statements concerning his actions, which, as non-hearsay, the court could consider substantively.

We affirm.

/s/ William C. Whitbeck
/s/ Christopher M. Murray
/s/ Pat M. Donofrio